

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION SIX**

GAVCO MATERIALS, INC.

Employer

and

**Case** 6-RC-12594

INTERNATIONAL UNION OF OPERATING  
ENGINEERS, LOCAL NO. 66, 66A, B, C, D, O &  
R, AFL-CIO

Petitioner

**REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION**

The Employer, Gavco Materials, Inc., is engaged in the manufacture, retail and nonretail sale of concrete and building materials at its facilities in Charleroi, Carmichaels, Uniontown and Connellsville, Pennsylvania, where it employs approximately 41 employees. The Petitioner, International Union of Operating Engineers, Local No. 66, 66 A, B, C, D, O & R, AFL-CIO, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit, as amended at the hearing, of all full-time and regular part-time production and maintenance employees and drivers employed by the Employer at its batch plants located in Charleroi, Pennsylvania; Carmichaels, Pennsylvania; and Uniontown, Pennsylvania; excluding all office clerical employees and guards, professional employees and supervisors as defined in the Act, managers, and all other employees. A hearing officer of the Board held a hearing and the parties filed timely briefs with me, which have been duly considered.

The parties are in agreement that any appropriate unit should include the production and maintenance employees and drivers at the Charleroi, Carmichaels and Uniontown facilities.

However, the Employer contends that the requested unit is too limited in scope and asserts that the four employees working at its Connellsville facility should be included in any unit found appropriate. In addition, the Petitioner, contrary to the Employer, would exclude five of the six plant operators<sup>1</sup> on the basis that they are supervisors and/or that they lack a community of interest with the petitioned-for employees.<sup>2</sup> The Employer takes a position that the plant operators are not statutory supervisors and that they share a community of interest with the petitioned-for employees.

Finally, the Petitioner would exclude Jason Sherid, Darrell Shannon and James Downer at the Charleroi facility and David Shoemaker at the Uniontown facility on the basis that they do not share a sufficient community of interest with the production and maintenance employees and drivers to compel their inclusion in the unit.<sup>3</sup> The Employer, contrary to the Petitioner, argues that these employees share a community of interest with the petitioned-for employees and therefore there is no legitimate basis upon which to exclude them.

The unit sought by the Petitioner has approximately 29 employees, while the unit the Employer seeks would include about 41 employees. The Petitioner has indicated a willingness to proceed to an election in any unit found appropriate herein.

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<sup>1</sup> As noted herein, the parties stipulated that Paul Dykta, the sixth plant operator, is a supervisor within the meaning of the Act.

<sup>2</sup> At the conclusion of the hearing, the Petitioner asserted that the plant operators should also be "excluded as technicians and/or even potentially professional employees." In its brief, the Petitioner argues that the plant operators should be excluded on the bases of their supervisory status and because they lack a sufficient community of interest with the employees in the petitioned-for unit, thus apparently abandoning its arguments that they are either professional and/or technical employees. Accordingly, I need not decide these issues. However, I note that there is no evidence in the record to establish that the plant operators are professional employees. Even assuming, arguendo, that the record established that plant operators are technical employees, their inclusion in the unit would depend on whether they share a community of interest with the employees in the petitioned-for unit. Dynalelectron Corporation, 231 NLRB 1147, 1148 (1977); Sheffield Corp., 134 NLRB 1101, 1103 (1961). Because I have determined that the plant operators will be permitted to vote subject to challenge in the election directed herein, I need not determine the community of interest of the plant operators at this time.

<sup>3</sup> In its brief, the Petitioner did not address the status of Downer or Shoemaker, and for the first time took the position that Darrell Shannon should be excluded on the basis that he does not share a community of interest with the unit employees in the petitioned-for unit.

I have considered the evidence and the arguments presented by the parties on each of the issues. As discussed below, as to the scope of the unit, I have determined that a unit limited to the three batch plant facilities is an appropriate unit. As to the eligibility of the plant operators, I have concluded that the plant operators will be permitted to vote subject to challenge in the election directed herein. I have also concluded that David Shoemaker and James Downer share such a substantial community of interest with the petitioned-for employees that they must be included in the unit. Further, I have determined that Jason Sherid does not share such a sufficient community of interest with the petitioned-for employees as to mandate his inclusion in the unit. As to the placement of Darrell Shannon, I note that the Petitioner's position with respect to Shannon was not made known to the Employer at the hearing. Although the record indicates that Shannon works with Sherid in the store area of the Charleroi facility, the record also establishes that Shannon has a commercial driver's license and may, from time to time, drive a truck. It is unclear whether Shannon is a dual-function employee and neither party focused on this issue at the hearing. In its Brief, the Petitioner declares that Shannon should be excluded from the unit and the Employer's Brief is silent on this issue. On the basis of this record and in the absence of substantial argument in the briefs, I am unable to determine Shannon's status. Therefore, I shall permit Shannon to vote subject to challenge in the election. Accordingly, I have directed an election in a unit that consists of approximately 36 employees.

To provide a context for my discussion of the issues, I will first provide an overview of the Employer's operations. Then, I will present in detail the facts and reasoning that support each of my conclusions on the issues.

## **I. OVERVIEW OF OPERATIONS**

The Employer is engaged in the manufacture and retail and nonretail sale of ready-mix concrete and building and landscaping materials at its facilities located in Charleroi,

Carmichaels, Uniontown and Connellsville, Pennsylvania. The Employer's manufacturing operations consist of three batch plants in Charleroi, Carmichaels and Uniontown.<sup>4</sup>

The overall operation of the four facilities involved herein is the responsibility of the Employer's General Manager, Lou Hamo. Hamo's office is located at the Employer's administrative office at 850 North Gallatin Avenue in Uniontown, Pennsylvania.<sup>5</sup> Hamo reports to President William Snoddy, Jr. and Vice President/Secretary William Snoddy, Sr. Also working at the administrative offices is Central Dispatcher Mike Kozura.<sup>6</sup>

At the Charleroi facility, the Employer employs approximately 16 drivers, one equipment operator, three laborers, two shop mechanics and plant operators Paul Dykta and Billie Bastian. At this facility, there is a building with a showroom/store area and offices which overlooks the batch plant. There is also a storage building and yard and a shop for maintenance and repair of the Employer's trucks.<sup>7</sup>

At the Carmichaels facility, the Employer employs one equipment operator, two drivers and two plant operators. At this facility, an office, batch plant and lab are located in a large trailer. The Employer also maintains stockpiles of block, stone and sand and a small assortment of tools and supplies which can be sold to the public. Although a showroom has been built, it is not in use as the inside is unfinished.

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<sup>4</sup> The Charleroi facility is between 26 to 30 miles from the Uniontown and Carmichaels facilities. The Uniontown and Carmichaels facilities are about 15 miles apart. The Connellsville facility is 12 miles, 22 miles and 25 miles from the Uniontown, Carmichaels and Charleroi facilities, respectively.

<sup>5</sup> The Employer's higher management and administrative support, sales staff and the Central Dispatcher also work at this administrative office.

<sup>6</sup> The parties stipulated, and I find that General Manager Lou Hamo is a supervisor within the meaning of Section 2(11) of the Act based on his authority to hire and fire. Notwithstanding that Paul Dykta has the same title as the plant operators at issue herein, the parties also stipulated Dykta is a supervisor within the meaning of Section 2(11) of the Act based on his authority to assign and responsibly direct and to effectively recommend discipline. The parties further agreed that none of the individuals working at the Employer's administrative office, including Central Dispatcher Mike Kozura, should be included in the petitioned-for unit herein.

<sup>7</sup> The shop is located 150 yards from the showroom and office building.

At the Uniontown facility, the Employer employs five drivers and one laborer and two plant operators. There is no showroom at the Uniontown batch plant, but the Employer maintains a supply of tools and materials and decorative wall block for sale to customers.

Working at the fourth facility in Connellsville are three laborers<sup>8</sup> and one driver. There is a large showroom featuring building supplies, concrete block, retaining walls, gardening tools, landscaping stone, mulch and flowers.<sup>9</sup> As noted, there is no batch plant at this location. The Employer began operations three years ago when the Charleroi facility was purchased from an existing enterprise. In 2005, the Employer opened the Carmichaels facility which was followed by the opening of the Uniontown facility in 2006. In early 2007, the Connellsville facility was opened.

As of July 2007, the Employer instituted a central dispatch system.<sup>10</sup> Since then, all customer calls relating to the batch plants have been handled by Central Dispatcher Kozura from the administrative office. Kozura determines which plant has the capability to best serve the customer.<sup>11</sup> Kozura calls the plant operators at each of the batch plants and advises them of the orders for the following day. The plant operators then make assignments to the ready-mix driver based on a seniority list. The system historically used by the Employer is that the senior driver takes the first load. Upon returning to the facility after the initial load, drivers are sent out according to the order in which they returned. The record reveals that the batch plant drivers are dispatched to plants other than their "home" plant if one of the other plants has more loads to be delivered than drivers available. This occurs both at the beginning of a shift and

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<sup>8</sup> As discussed in more detail below, one of the three laborers is Charles Gergely, who functions as the store clerk at Connellsville.

<sup>9</sup> The record indicates that the building which houses the Connellsville facility was previously a gas station.

<sup>10</sup> Prior to July 2007, all customer calls went to the Charleroi facility. The record indicates that the change to the central dispatch system initially was planned in at least January 2007.

<sup>11</sup> This determination is often based on the geographical proximity to the customer.

during the workday. During the workday, Central Dispatcher Kozura contacts either the driver or plant operator by Nextel telephone with instructions as to where the driver is next needed.<sup>12</sup>

Employees at the four locations enjoy common benefits, which include health insurance and paid holidays. All of the employees at issue herein are hourly paid, with the exception of plant operators Billie Bastian and Scott Stoner.<sup>13</sup> The employees at the four facilities are each provided with five lime green safety shirts on which the Employer's name appears. The Employer requests, but does not mandate, that these shirts be worn while on duty. On jobs performed for the Commonwealth of Pennsylvania, the ready-mix drivers are required to wear lime green vests. The Employer issues Nextel telephones to almost every employee working at the four facilities involved herein.

The employees working at the batch plants punch a time clock.<sup>14</sup> The employees at the Connellsville facility manually record their time inasmuch as there is no time clock at that facility. Time cards or records are collected at each facility and are sent, faxed or called in to the Employer's administrative office where the payroll is handled. The record reveals that the plant operators, who are paid on an hourly basis, earn between \$14.00 and \$15.00 per hour. The drivers are paid between \$12 and \$17 per hour. The two equipment operators earn \$14.40 and \$17.50. Laborers earn between \$7.15 and \$10 per hour.<sup>15</sup> The employees at the four facilities are all paid on the same payday.

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<sup>12</sup> The record contains evidence with respect to one of the Charleroi laborers, James Downer, being assigned to assist at the Uniontown and Carmichaels plants. Downer has never been assigned to work at Connellsville. At times, plant operators also work at other batch plants.

<sup>13</sup> According to Hamo, Bastian's status as a salaried employee was negotiated before Hamo became the General Manager. No further information on her status or Stoner's status as salaried employees is included in the record.

<sup>14</sup> Depending on whether they began work at a batch plant other than their home plant, the record indicates that the plant operators may or may not punch a time clock. If they do not punch the time clock, they must record their time.

<sup>15</sup> Sherid, Downer and Shoemaker, whose placement is at issue herein, are classified by the Employer as laborers and are paid \$10.00, \$9.00 and \$10.00 per hour, respectively. Shannon, who I have determined will be permitted to vote subject to challenge, is classified as a driver and is paid \$13.00 per hour.

The record contains recent Employer advertisements which were apparently placed in publications for various county fairs. The Charleroi, Carmichaels and Uniontown operations are listed as state-approved Redi-Mix Concrete plants, whereas the Connellsville operation is referred to as a landscaping supply yard. The advertisement lists the telephone numbers for each facility as well as a toll-free telephone number for pricing. When the toll free number is dialed, customers with questions regarding concrete pricing are directed to Central Dispatcher Kozura. Customers with questions regarding landscaping materials or building supplies are transferred to the Connellsville facility.

## **II. THE CONNELLSVILLE FACILITY**

Since its opening in early 2007, Charles Gergely has been the sales clerk at the Connellsville facility.<sup>16</sup> In this capacity, Gergely is the only employee at Connellsville who is authorized to handle cash and credit sales. Before the opening of the Connellsville location, Gergely was the store clerk at the Charleroi facility. Gergely is responsible for the ordering of building supplies and cement block for direct orders.<sup>17</sup>

Gergely's duties include the distribution of the Employer's Nextel telephones. Inasmuch as the Connellsville facility is not connected to the central dispatch system, Gergely dispatches Don Walters, the dump truck driver who works at this facility. Walters, who is classified as a driver, delivers sand, stone and mulch to customers.<sup>18</sup>

Two "yard laborers," Dustin DiCenzo and Chris Goodwin, work at the Connellsville facility. Their primary duty is to load customers' vehicles utilizing a Bobcat or skid steer. They also perform the routine tasks of watering flowers, cleaning the lot and assisting with the delivery of cement block. The record establishes that neither DiCenzo nor Goodwin has a

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<sup>16</sup> No party has contended that Gergely is a supervisor within the meaning of the Act. In addition, despite his duties as a store clerk, Gergely is classified by the Employer as a laborer.

<sup>17</sup> Gergely must check with Hamo before ordering block and other supplies to have in stock.

<sup>18</sup> Walters drives a one-ton or five-ton dump truck. The record establishes that Walter's does not drive a Redi-Mix concrete truck.

commercial driver's license (CDL).<sup>19</sup> Both DiCenzo and Goodwin are high school students who began working at the Connellsville facility in June 2007. Hamo indicated that the Employer expects both DiCenzo and Goodwin to work limited hours during the school year. However, the Employer has not yet determined whether the Connellsville facility will remain open after December.<sup>20</sup>

The record reveals that the Connellsville facility is open from 8 a.m. to 6 p.m. on weekdays and from 8 a.m. to 3 p.m. on Saturdays. The four employees there start work at 7 a.m. unless otherwise directed.<sup>21</sup>

The employees working at the Connellsville facility report to Gergely, who in turn reports to Hamo. Hamo sets the wages of the Connellsville employees and decides the amount of any wage increases. Hamo approves all requests for time off and determines the overtime for these employees. Hamo usually visits the Connellsville facility in the morning or the evening. If unable to visit the facility, he communicates with Gergely by telephone. Hamo reviews the sales made by the Connellsville facility on a daily basis.<sup>22</sup>

The record establishes limited interaction between the employees at the Connellsville facility and those working at the Charleroi, Carmichaels and Uniontown batch plants. In June 2007 Charleroi driver Al Imbrogno poured a load of concrete at the Connellsville facility that had previously been rejected at a customer's jobsite. The concrete was used to make a floor for an outside bin. There is no evidence that Imbrogno interacted with the Connellsville employees

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<sup>19</sup> Although not specifically stated, it appears that Walters likewise has no CDL in that he does not drive a cement mixer.

<sup>20</sup> The Employer classifies DiCenzo and Goodwin as laborers.

<sup>21</sup> Gergely advises Hamo when business is slow. Hamo then determines who will be scheduled to work. Before being assigned to the Connellsville facility, Gergely worked as the store clerk at the Charleroi facility. Gergely was one of 15 employees working at the Charleroi facility when the business was purchased by the Employer. The record establishes that Gergely is paid a substantially higher wage rate than the other employees at Connellsville, which Hamo attributes to his longevity with the Employer.

<sup>22</sup> The record establishes that Supervisor Dykta reports to Hamo on the performance of the employees working at the three batch plants. Thus, it appears that the batch plant employees report directly to him.



when he delivered the concrete. There is also evidence that the truck driver from the Connellsville facility goes to the Charleroi facility to pick up cement block for delivery to the other facilities. In the two months prior to the hearing DiCenzo and Goodwin drove from Connellsville to the location of the deliveries on four or five occasions to help offload concrete block. On other occasions, tri-axle drivers from Charleroi and Uniontown have picked up material for delivery to the Connellsville store.<sup>23</sup> Finally, the record indicates that in July 2007, DiCenzo and Goodwin assisted with a physical inventory at Charleroi.

As to employee interchange, the only evidence of substitution by or for any employee at the Connellsville facility is that Jason Sherid fills in for Gergely if he needs to be off. According to Hamo, this occurs approximately one to two times per month. As set forth in more detail below, Sherid is responsible for the store area at the Charleroi facility, and I have determined that he does not share a community of interest with the batch plant employees.

The Board discussed its principles regarding appropriate units at length in Overnite Transportation Company, 322 NLRB 723 (1996). The Board stated that it is well settled that employees of an employer may be appropriately grouped in more than one way for the purposes of collective bargaining, and that the Board's policy is to consider first whether the petitioned-for unit is appropriate. "There is nothing in the statute which requires that the unit for bargaining be the *only* appropriate unit, or the *ultimate* unit, or the *most* appropriate unit; the Act only requires that the unit be 'appropriate.'" Overnite Transportation Company, supra, quoting Morand Bros. Beverage Co., 91 NLRB 409, 418 (1950), *enfd.* on other grounds 190 F.2d 576 (7<sup>th</sup> Cir. 1951). A union is not required to seek the largest or most comprehensive grouping of employees, so long as the unit requested is an appropriate one. Overnite Transportation Company, supra. Thus, the Board's procedure for determining an appropriate unit under Section 9(b) is first to examine the petitioned-for unit. If that unit is appropriate, then the inquiry ends

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<sup>23</sup> Uniontown plant operator Frank Gallo testified that between 0 to 5 times a day a driver from at the Connellsville facility will pick up loads of sand or gravel at Uniontown.

there. Bartlett Collins Co., 334 NLRB 484 (2001). See Dezcon, Inc., 295 NLRB 109, 111 (1989).

This case presents the issue of whether a petitioned-for multilocation unit is an appropriate unit for bargaining or whether other locations must be included. The Board has stressed on many occasions that the Act does not compel labor organizations to seek to represent the most comprehensive grouping of employees unless such grouping constitutes the only appropriate unit. In determining whether a petitioned-for multifacility unit is appropriate, the Board evaluates the following factors: (a) employees' skills and duties; (b) terms and conditions of employment; (c) employee interchange; (d) functional integration; (e) geographical proximity; (f) centralized control of management and supervision; and (g) bargaining history. Bashas', Inc., 337 NLRB 710 (2002); Alamo Rent-A-Car, 330 NLRB 897 (2000); Macy's West Inc., 327 NLRB 1222, 1223 (1999).

I have concluded that the community of interest between the employees at the Connellsville facility and those working at the three batch plants is not so substantial as to render inappropriate the unit sought by the Petitioner. In this regard, I have considered the evidence that supports the unit urged by the Employer. For instance, I note that the geographic proximity between the Connellsville facility and the three batch plants is similar to the distance between the batch plants. The record also establishes centralized control of administrative functions among the four facilities in that the administrative office handles the collection of time records and payroll. Depending on the nature of the customer's call, the administrative office directs them to Central Dispatch for concrete orders or to the Connellsville facility for building and landscaping supplies. There is common overall supervision by Hamo, although the record shows that the batch plant employees are immediately supervised by Dykta and the Connellsville employee's report to Gergely, who, in turn, communicates with Hamo. Finally, the employees of the four facilities share common benefits.

In considering whether the unit requested by the Petitioner is an appropriate one, the record reflects significant differences in the working conditions of the two groups. For instance,

there is no time clock at the Connellsville facility and the hours worked by the employees at that location differ from those of the employees who work at the three batch plant locations. At the batch plants, the plant operators, drivers and laborers are scheduled to arrive at work based on the scheduling needs of customers with respect to the concrete. At times, this requires the batch plant employees to arrive at work in the middle of the night. At Connellsville, employees, other than Gergely, generally work from 7 a.m. to 3 p.m. The store is open, which is from 8 a.m. to 6 p.m. on weekdays and from 8 a.m. to 3 p.m. on Saturdays.

The employees who work at the three batch plant facilities have essentially identical skills, although they may differ among production and maintenance employees and drivers within a particular facility. All of the batch plant employees, with the exception of Sherid, whose unit placement will be discussed herein, are involved in the manufacture and delivery of concrete. In this regard, batch plant employees load trucks, mix and deliver cement utilizing the cement trucks, repair and maintain trucks, assist with controlling the temperature of concrete and maintain the plant. All of the Redi-mix concrete truck drivers possess a CDL.

The employees at the Connellsville facility are involved in the retail sale of landscaping materials and building supplies. None of them possess a CDL and they do not operate the concrete trucks.

Three of the four employees at Connellsville were hired to work at that location. It appears from the record that only Gergely was permanently transferred from the Charleroi facility to the Connellsville facility to operate the retail operation there. I note that permanent transfers are considered to be less indicative of interchange than temporary ones. Red Lobster, 300 NLRB 908, 911 (1990).

The evidence regarding temporary transfers is limited to Sherid's occasional filling in for Gergely inasmuch as no other employee at Connellsville is authorized to make cash or credit sales. As noted herein, substitution by Sherid does not constitute evidence of employee interchange with employees in the petitioned for unit inasmuch as I have concluded that Sherid should be excluded from the unit. Accordingly, there is no evidence of employee interchange

between the Connellsville facility and the three batch plant facilities. Conversely, the record shows that the batch plant drivers are dispatched to plants other than their regular plant when those plants have more loads to be delivered than drivers available. This occurs both at the beginning of a shift and during the work day. For such assignments during the day, Central Dispatch contacts the driver or plant operator by Nextel with instructions. Similarly, laborers and plant operators perform work at other batch facilities when the need arises.

There is evidence in the record of some contact between the employees at Connellsville and the employees at the three batch plants. However, that contact is primarily limited to the pick up and drop off of materials between the facilities, during which little interaction takes place. Other than this type of contact, there is one instance of assistance by two Connellsville employees with an inventory at the Charleroi facility.

Based on the above and the record as a whole, I find that the unit limited to the employees working at Charleroi, Carmichaels and Uniontown facilities is an appropriate unit inasmuch as the evidence establishes that the employees at those three facilities share a community of interest distinct from that shared by employees at the Connellsville facility. There is employee interchange among these facilities and these facilities function primarily to manufacture and sell concrete, whereas Connellsville is primarily a retail establishment selling building supplies and landscaping materials. Thus, contrary to the Employer's assertion, a unit limited to the employees at the batch plants is not an arbitrary grouping. Accordingly, I find that a unit limited to the petitioned-for employees working at the Charleroi, Carmichaels and Uniontown batch plants is appropriate, and I shall exclude the employees working at the Connellsville facility.

## II. THE PLANT OPERATORS

### A. Overview<sup>24</sup>

Two plant operators work at each of the three batch plants. Plant operator Billie Bastian works at the Charleroi facility with supervisory plant operator Paul Dykta. Plant operators, Frank Gallo and Scott Stoner, work at the Uniontown facility and plant operators Sam Campieri and David O'Brien work at the Carmichaels facility. The Petitioner contends that the plant operators supervise the employees at the respective batch plants where they work. It further asserts that plant operators determine when drivers will begin their work day, which truck they will drive, where they will be sent during the workday and when they will finish up each day. The Petitioner also contends that plant operators have the authority to send employees home for obvious misconduct, recommend discipline, recommend employees for hire and report good performance. The Employer asserts that the plant operators are non-supervisory employees who share a substantial community of interest with employees in the petitioned-for unit.

Plant operators work at the controls of the batch plant and are responsible to monitor the process. Each day, the plant operators receive a fax from Central Dispatcher Kozura which lists the orders to be filled for the following day.<sup>25</sup> The plant operators arrive at work before the drivers to prepare the plant for the manufacture of the day's concrete orders. This preparation involves starting the air compressors and water pumps. The plant operators then program the orders into the computer, which in turn will determine the proper percentage of cement, sand and stone<sup>26</sup> for each customer's particular batch of concrete. Once the information is

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<sup>24</sup> The facts set forth on supervisory status are based on the evidence developed at the hearing. As explained more fully herein, I have refrained from determining the status of the plant operators because the Petitioner may not have had the opportunity to develop a complete factual record.

<sup>25</sup> The faxed document sets forth the customer's name, number of yards of concrete ordered, number of trucks needed and when the concrete is due at the customer's location. The record establishes that before the central dispatch system was instituted, the plant operators took orders from customers and determined the schedule of deliveries.

<sup>26</sup> These ingredients are stored in overhead bins.

programmed into the computer, plant operators print a batch ticket with all relevant information. Plant operators sign the batch ticket and present it to the driver who will be delivering the load. The driver also signs the batch ticket to record the delivery of the concrete.

The Employer trains its plant operators in-house and does not require any special schooling or certifications for the position. Plant operators Bastian and Campieri were employed as drivers before becoming plant operators. Plant operator Gallo was a laborer for about one month before the Uniontown plant became operational.

The order in which the drivers are sent out is usually determined by the seniority of the drivers at the particular batch plant. The Employer's system is that the most senior driver takes the first load. Drivers are then scheduled to arrive, in seniority order, every 15 to 30 minutes thereafter until all of the morning orders are loaded. Drivers will be assigned out of seniority order only if requested by the customer or if their truck is incapable of handling an order.

The record establishes that drivers are assigned to a particular truck. When the driver arrives at his scheduled arrival time he pulls up to the batch plant. With the assistance of the computer, the plant operator accesses the customer's order which causes the truck to be loaded with the proper mix of concrete ingredients. The concrete is then mixed and the driver makes the delivery.

Certain loads of concrete must be tested before being delivered to the customer. For instance, loads to be utilized by the Commonwealth of Pennsylvania must meet certain slump standards.<sup>27</sup> The results of a slump test will be recorded on the batch ticket.

Reloading of the cement mixer trucks is done based on which driver returns first to the facility. On an average day, a driver will deliver three or four loads of concrete. If there are no orders to be delivered, the plant operator will tell the driver to wash his truck and to go home.

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<sup>27</sup> Slump refers to the workability of the concrete. The Pennsylvania Department of Transportation ("PennDOT") has slump specifications which must be met. All slump test results are overseen by Dykta.

The plant operator is responsible for certain paperwork at the end of each day and will ensure that the plant is operational for the following day.

The record reveals that plant operators O'Brien and Campieri are certified concrete testers. A concrete tester has the ability to test concrete. As of this year, plant operators Bastian and Gallo became certified concrete technicians.<sup>28</sup> A concrete technician has the ability to design a mix to meet PennDOT specifications. At the Employer's facility, the mixes are designed solely by Dykta. Being concrete technicians, Gallo and Bastian can program certain adjustments to a mix. If a load does not meet testing specifications or if some other problem exists, only Dykta or Hamo can determine that the load must be scrapped.<sup>29</sup>

Hamo interviews and hires new employees. The record indicates that any employee, including a plant operator, can recommend applicants for hire. Plant operator Gallo testified that one individual he recommended was hired and one was not. Hamo also determines the wage rate to be paid to new employees and the amount of any wage increases. Plant operators have expressed their opinions to Hamo and Dykta as to whether drivers do or do not perform well. Gallo testified that he has done so but has not been told whether his opinion resulted in any action by the Employer.<sup>30</sup> The record reveals that plant operators have been given the authority by Hamo to send drivers home if they are intoxicated when they arrive at work. Neither the drivers nor the plant operators receive formal evaluations. Inasmuch as the plant operators cannot authorize a request for time off, such requests for time off are referred to Hamo. If employees quit or are terminated, Hamo determines whether they will be replaced.

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<sup>28</sup> To become a certified concrete tester, a passing grade on a test administered by PennDOT is required. Two years after tester status is achieved, an individual can take a test to become a certified technician. The Employer does not require that its plant operators have or obtain either certification. Prior to this year, only Dykta and Stoner were certified technicians.

<sup>29</sup> Dykta also determines that the amount of cement, sand and stone to be ordered for all the three batch plants. Dykta calls the plant operators to determine the amount of material needed at each plant.

<sup>30</sup> The record contains some evidence that plant operators have yelled at or "chewed out" drivers. Plant operator Gallo testified that Hamo has cautioned him to "keep his cool." However, no record is made of such incidents and no discipline has resulted.

Three of the five plant operators at issue are paid on an hourly basis, and their wage rate falls within the range of wages paid to the drivers with whom they work. As noted previously, two of the plant operators are salaried.

Plant operators cannot select employees for layoff. The record reflects that layoffs at the Uniontown facility last winter were decided by consensus of the employees.

The record establishes that all of the batch plant employees frequently work overtime, which is often necessary to complete the job. Drivers can refuse to accept a load of concrete if they have already worked 12 hours in a day. In addition, the Employer maintains that drivers cannot be forced to deliver a load even when they have not yet worked 12 hours in a day. Driver Al Imbrogno acknowledged that generally a driver can pass on the opportunity to deliver another load. However, he further testified that on one occasion when he wanted to leave work at approximately 4 p.m., plant operator Bastian told him that he could not pass on the load to a junior employee. The record indicates that Dykta was nearby and heard the conversation when this occurred.

#### **B. Legal Standard for Supervisory Status**

The first issue to be addressed is the assertion of the Petitioner, contrary to the Employer, that the plant operators should be excluded from the unit found appropriate herein because they are statutory supervisors. Before examining the specific duties and authorities of the plant operators, I will review the requirements for establishing supervisory status. Section 2(11) of the Act defines the term supervisor as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In considering whether the individuals at issue here possess any of the supervisory authority set forth in Section 2(11) of the Act, I am mindful that in enacting this section of the



Act, Congress emphasized its intention that only supervisory personnel vested with “genuine management prerogatives” should be considered supervisors, and not “straw bosses, leadmen, set-up men and other minor supervisory employees.” Chicago Metallic Corp., 273 NLRB 1677, 1688 (1985). Thus, the ability to give “some instructions or minor orders to other employees” does not confer supervisory status. *Id.* at 1689. Indeed, such “minor supervisory duties” should not be used to deprive such individuals of the benefits of the Act. NLRB v. Bell Aerospace Co., 416 U.S. 267, 280-281 (1974), quoting Sen. Rep. No. 105, 80<sup>th</sup> Cong. 1<sup>st</sup> Sess., at 4.

To meet the definition of supervisor in Section 2(11) of the Act, a person needs to possess only one of the 12 specific criteria listed, or the authority to effectively recommend such action. Ohio Power Co. v. NLRB, 176 F.2d 385 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949). The exercise of that authority, however, must involve the use of independent judgment. Harborside Healthcare, Inc., 330 NLRB 1334 (2000).

The burden of proving supervisory status lies with the party asserting that such status exists. NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706, 711-712 (2001); Arlington Masonry Supply, Inc., 339 NLRB 817, 818 (2003); Dean & DeLuca New York, Inc., 338 NLRB 1046, 1047 (2003). As a general matter, I note that for a party to satisfy the burden of proving supervisory status, it must do so by a preponderance of the credible evidence. *Id.* at 1047; Star Trek: The Experience, 334 NLRB 246, 251 (2001). The Board has frequently warned against construing supervisory status too broadly because an employee deemed to be a supervisor loses the protection of the Act. See, e.g., Vencor Hospital – Los Angeles, 328 NLRB 1136, 1138 (1999); Bozeman Deaconess Hospital, 322 NLRB 1107, 1114 (1997). Accordingly, any lack of evidence in the record is construed against the party asserting supervisory status. See Williamette Industries, Inc., 336 NLRB 743 (2001); Michigan Masonic Home, 332 NLRB 1409 (2000). Moreover, “[w]henver the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia.” Phelps Community Medical Center, 295

NLRB 486, 490 (1989). Consequently, mere inferences or conclusionary statements without detailed specific evidence of independent judgment are insufficient to establish supervisory status. Sears, Roebuck & Co., 304 NLRB 193 (1991).

Possession of authority consistent with any of the indicia of Section 2(11) is sufficient to establish supervisory status, even if this authority has not yet been exercised. See, e.g., Fred Meyer Alaska, 334 NLRB 646, 649, fn. 8 (2001); Pepsi-Cola Co., 327 NLRB 1062, 1064 (1999). The absence of evidence that such authority has been exercised may, however, be probative of whether such authority exists. See Michigan Masonic Home, supra, at 1410; Chevron U.S.A., 309 NLRB 59, 61 (1992). The Board and the Courts have recognized that an employee does not become a supervisor merely because he has greater skills and job responsibilities than fellow employees or because he gives some instructions or minor orders. Byers Engineering Corp., 324 NLRB 740 (1997); Chicago Metallic Corp., 273 NLRB 1677 (1985).

### **C. Analysis of Supervisory Status**

With regard to whether the plant operators possess any of the 12 indicia of supervisory status listed in Section 2(11) of the Act, it is noted that the Petitioner does not contend nor is there any record evidence to establish that these individuals hire, transfer, suspend, lay off, recall, promote, discharge, or adjust grievances. Rather, the Petitioner's position at the hearing appeared to focus on the involvement of the plant operators in effectively recommending individuals for hire, discipline, and rewards, and in assigning and responsibly directing other employees.

Establishing supervisory status is one of the rare issues in a representation case where a party has a clear burden of proof. As noted, the burden of proving supervisory status rests on the party asserting it. Prior to the hearing in this matter, the Petitioner served a subpoena on the Employer seeking personnel files and other documents it deemed necessary in order to meet its burden of proof regarding the supervisory status of the plant operators. The Employer timely filed a Petition to Revoke Subpoena Duces Tecum seeking to revoke the subpoena in its

entirety. After the Hearing Officer ruled on the Petition to Revoke and directed the Employer to turn over personnel files and certain of the other subpoenaed information, the Employer refused to provide the Petitioner unsupervised access to the records. The Hearing Officer subsequently issued a subpoena seeking many of the same documents sought by the Petitioner. In this regard, in balancing various factors, it was determined that to commence subpoena enforcement proceedings immediately with respect to the Petitioner's subpoena would unduly delay the instant proceeding.

At the hearing, the Employer provided information to the Hearing Officer, but refused to permit the Union unrestricted access to certain records covered by the subpoena which may have been probative on the issue of the supervisory status of the plant operators. Although the Hearing Officer attempted to make a complete record by subpoenaing information, the burden of proof nevertheless rests on the Petitioner to establish supervisory status. In considering the record, I have determined that the Hearing Officer's efforts to develop a complete record cannot substitute for the Petitioner's lost opportunity and responsibility to attempt to meet its burden of proof. A decision on the status of the plant operators based on a record where the Petitioner was denied access to certain documents would remove the burden from the Petitioner and place it on the Board, which would be inappropriate. Therefore, on this record, I cannot conclude that the Petitioner has failed to sustain its burden. It is speculative to say what would have happened if the Employer fully complied with the Petitioner's subpoena or granted the Petitioner unrestricted access to documents subpoenaed by the Hearing Officer. In addition, the issuance of a determination in these circumstances would deny the Petitioner's due process rights and allow the Employer to benefit from its failure to fully comply with the subpoena issued by the Petitioner, including by its refusal to provide the Petitioner access to documents covered by its and the Board's subpoena. Representation cases are non-adversarial proceedings and the Employer's actions during this matter have precluded the development of a full record.

In these circumstances, due to the Employer's actions in this case, I consider it appropriate to refrain from determining whether the plant operators are statutory supervisors. Accordingly, I shall permit them to vote subject to challenge in the election directed herein.

#### **IV. UNIT PLACEMENT ISSUES**

##### **A. Jason Sherid**

Jason Sherid is the store clerk at the Charleroi facility. In this position, he is responsible for overseeing the showroom/building supply store there. Sherid was hired to handle sales at the Connellsville facility but was moved to the Charleroi facility to "run the store." Sherid works in an open office area behind the sales counter in the showroom. It appears from the record that he shares the office area with Darrell Shannon.<sup>31</sup> Sherid fills in at the Connellsville facility once or twice per month if Gergely needs to be off. Sherid does not substitute for any of the production maintenance employees or drivers at the Charleroi facility or any other facility.<sup>32</sup>

Sherid is also responsible for gathering and transmitting information to the Employer. For instance, Sherid collects the time cards of the employees at the Charleroi facility and sends them to the Employer's administrative office. At times, Sherid will provide drivers at the Charleroi facility with documentation and directions to a jobsite. It appears from the record that this information is received via computer and Sherid prints the information off and delivers it to the drivers. Sherid collects the drivers' delivery tickets and submits them to the administrative office. The Employer asserts that Sherid leaves the office area if he needs to verify inventory or to tell a driver that he needs to load material onto a truck. However, driver Al Imbrogno, a witness called by the Petitioner, testified that he has never seen Sherid in the yard. Imbrogno

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<sup>31</sup> As noted previously, I have determined that Shannon shall be permitted to vote subject to challenge in the election directed herein inasmuch as his placement was not at issue during the hearing. The record does reflect, however, that Shannon was being trained for the central dispatcher position until Mike Kozura was hired. Unlike Sherid, Shannon has a CDL and has the ability to run or operate a cement mixer and deliver materials. The record indicates that Shannon has not operated a cement mixer, but he may have delivered materials on one or two occasions.

<sup>32</sup> Sherid does not possess a CDL.

and other drivers pick up their batch tickets in the control room near the doorway of Sherid's office. On such occasions, there is no time to converse, but he has exchanged greetings with Sherid and Shannon.

Sherid works from 7 a.m. to 5 p.m. He does not punch the time clock at the Charleroi facility; instead he records his time.

According to the Employer, Sherid occasionally performs work in the yard, such as inventory and counting the orders of block which are to be delivered to customers. The block truck driver also checks the count of block orders when he is to make a delivery. Sherid interacts with Gergely at the Connellsville facility regarding block orders, tool restocking, inventory and mortar orders.<sup>33</sup>

The record indicates that Sherid has a locked safe in his office area where \$500 is kept for tolls and other items requiring cash. Sherid provides drivers with necessary toll money and collects toll slips from the drivers when they return to the facility. Sherid then submits the toll slips to the Employer's administrative office for reimbursement to the cash fund.

In this case, the Petitioner seeks to exclude Sherid, an employee working in the Employer's retail showroom and performing administrative functions. Sherid's eligibility must be examined to determine whether he possesses a community of interest with the production and maintenance employees and drivers so as to require his inclusion in the unit.

Sherid's unit placement depends on his community of interest with the petitioned-for employees. In determining whether the employees in the unit sought possess a separate community of interest, the Board examines such factors as mutuality of interest in wages, hours, and other working conditions; commonality of supervision; degree of skill and common function; frequency of contact and interchange with other employees; and functional integration. Boeing Company, 337 NLRB No. 24 (2001), citing Ore-Ida Foods, 313 NLRB No. 1016 (1994), affirmed 66 F.3d 328 (7<sup>th</sup> Cir. 1995).

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<sup>33</sup> Mortar is ordered by Gergely.

I recognize that Sherid may, at times, count inventory or orders for cement block in the yard of the Charleroi facility, and that he is supervised by Dykta and Hamo. However, Sherid works primarily in his office area and in the retail showroom apart from the Employer's nonretail employees. Sherid works daytime hours whereas the batch plant employees at Charleroi often work in the middle of the night or very early in the morning depending on when the customer needs the concrete poured. Sherid's primary focus is the Employer's store which is distinct from the focus of the batch plant employees. Although there is a reference to plant operators Dykta and Bastian filling in at the store, no information was provided as to the frequency or duration of this substitution. Likewise, the testimony as to Sherid's participation in inventory counts and order checks was vague and lacked detail. In these circumstances, the occasional instances of Sherid performing production and maintenance work and a batch plant operator performing store clerk work is insufficient to establish that Sherid has such a substantial community of interest with the petitioned-for employees so as to require his inclusion in the unit. A. Russo & Sons, Inc., 329 NLRB 402 (1999).<sup>34</sup>

**B. James Downer and David Shoemaker**

James Downer is a laborer at the Charleroi facility where he works primarily in the yard.<sup>35</sup> In this position, he assists with the clean up of the plant and monthly inventory. Downer also assists the block truck driver with organizing and loading the block truck. He also works with a driver in the building and stacking of tombs.<sup>36</sup> Downer is a high school student who worked for the Employer in the fall of 2006 and summer of 2007. The record is unclear as to whether Downer will cease working during the school year.

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<sup>34</sup> Notwithstanding the Employer's classification of Sherid as a laborer, my exclusion of Sherid is reflected in the unit description exclusion of retail store employees.

<sup>35</sup> The parties are in agreement that Richard Moze, a laborer performing similar duties at the Charleroi facility should be included in the unit.

<sup>36</sup> A tomb is a 2 foot by 2 foot by 6 foot mold which is filled with concrete when a driver returns to the facility with excess concrete. This mold must then be finished off by the laborer. After the tomb hardens the concrete is removed from the mold and stacked.

In order to control the temperature of the concrete, ice must be added to the cement mixer. To do this, two laborers are stationed on the ground near the mixer and will toss bags of ice to a third laborer who is stationed on the mixer near the hopper. The bags are then opened and dumped into the hopper. Downer participates in this process.<sup>37</sup> At times, the drivers also assist in icing the concrete.

The record reveals that laborers and drivers often work together in making tombs and icing the concrete. In addition, the drivers at the Charleroi facility assist with the washing of the lot and cleaning of the plant. As necessary, laborers and drivers will assist mechanics with heavy lifting. As to his work hours, Downer generally works 7 a.m. to 3 p.m. However, laborers including Downer and drivers are required to work in the evening or night if a customer requires a night pour. The record indicates that Downer has done so.

David Shoemaker was hired during the course of the hearing in this matter to fill a vacant laborer position at the Uniontown facility.<sup>38</sup> As such, Shoemaker performs work in the yard at Uniontown such as loading batch plant bins, stocking materials and assisting with the loading of rebar and sealer onto mixer trucks and general housekeeping. These duties are akin to the duties that Downer and Moze fulfill at the Charleroi facility.

Downer and Shoemaker have regular and continuing interaction with the drivers and other employees in the petitioned-for unit. They work the same hours as the drivers and often assist the drivers with the preparation of their loads of concrete. When drivers return with extra concrete, a laborer assists the drivers in the making and stacking of tombs. The record indicates that, at times, drivers assist the yard laborers with general clean up.

At the Charleroi facility, Downer and the drivers are supervised by Dykta. At the Uniontown facility, Shoemaker and the drivers take direction from the plant operators, who

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<sup>37</sup> The record reveals that Downer has also worked on ice detail at the Uniontown and Carmichaels facilities.

<sup>38</sup> The position became vacant when the laborer there was terminated prior to the hearing.

report to Hamo. Thus, Downer and Shoemaker share common supervision with the production and maintenance employees. It is undisputed that they are subject to benefits and work hours that are common to those employees. Moreover, Downer and Shoemaker also perform the same type of duties as laborer Richard Moze, who the Petitioner has agreed is properly included in the unit petitioned-for herein.

Accordingly, I find that James Downer and David Shoemaker share a community of interest with the employees in the petitioned-for unit which requires their inclusion in the unit.

## **V. FINDINGS AND CONCLUSIONS**

Based upon the entire record in this matter and in accordance with the discussion above, I find and conclude as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction in this matter.
3. The Petitioner claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees<sup>39</sup> of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time production and maintenance employees and drivers employed by the Employer at its batch plants located in Charleroi, Pennsylvania; Carmichaels, Pennsylvania; and Uniontown, Pennsylvania; excluding retail store employees and all office clerical employees, managerial employees and guards, professional employees and supervisors as defined in the Act, and all other employees.

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<sup>39</sup> As noted previously, the five plant operators and Darrell Shannon are permitted to vote subject to challenge in the election directed herein.



## **VI. DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by International Union of Operating Engineers, Local No. 66, 66A, B, C, D, O & R, AFL-CIO. The date, time and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

### **A. Voting Eligibility**

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

### **B. Employer to Submit List of Eligible Voters**

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior

Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, Two Chatham Center, Suite 510, 112 Washington Place, Pittsburgh, PA 15219, on or before **September 7, 2007**. No extension of time to file this list will be granted, except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at 412/395-5986. Since the list will be made available to all parties to the election, please furnish a total of **two (2)** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

### **C. Notice of Posting Obligations**

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of three (3) full working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least five (5) full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the

election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so precludes employers from filing objections based on non-posting of the election notice.

## **VII. RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14<sup>th</sup> Street, N.W., Washington, D.C. 20570-0001.<sup>40</sup> This request must be received by the Board in Washington by 5 p.m., EST (EDT), on **September 14, 2007**. The request may **not** be filed by facsimile.

Dated: August 31, 2007

/s/Gerald Kobell

Gerald Kobell, Regional Director

NATIONAL LABOR RELATIONS BOARD  
Region Six  
Two Chatham Center, Suite 510  
112 Washington Place  
Pittsburgh, PA 15219

### **Classification Index**

177-8560  
401-7550  
440-3375-3750

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<sup>40</sup> A request for review may be filed electronically with the Board in Washington, D.C. The requirements and guidelines concerning such electronic filings may be found in the related attachment supplied with the Regional Office's initial correspondence and at the National Labor Relations Board's website, [www.nlr.gov](http://www.nlr.gov), under "E-Gov." On the home page of the website, select the **E-Gov** tab and click on **E-Filing**. Then select the NLRB office for which you wish to E-File your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed.